83-1188

Office - Supreme Court, U.S.
FILED
JAN 11 1984
ALEXANDER L. STEVAS,
CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH T. SMITH
Petitioner

vs.

PENNSYLVANIA BOARD OF LAW
EXAMINERS
Respondent.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

Joseph T. Smith
11505 LeHavre Dr.
Potomac, MD 20854
Pro Se

Potomac, MD Communications In Print

QUESTIONS PRESENTED

1. Can a state bar a person from the practice of law in a manner or for reasons that contravene the due process or the equal protection clause of the Fourteenth Amendment. Was there a denial of due process of law in violation of Section I of the Fourteenth Amendment of the U.S. Constitution when Respondent failed to abide by established statistical testing methods and numerical computations when computing Petitioner's final grade on the July, 1982 bar examination.

2. Was there a denial of equal protection by passing certain applicants whose combined scores were lower than the combined score of Petitioner.

3. Did the statistical testing methods and numerical computations employed by Respondent result in manifest injustice by depriving Petitioner of a passing grade on the July 1982 bar examination.

4. Was Respondent arbitrary and capricious by insisting on discriminatory deprivation of information concerning the statistical methods used in computing Petitioner's final grade on the July 1982 bar examination.

5. Was there misrepresentation by Respondent in failing to use a numerical computation procedure it stated it would use, when that numerical computation procedure would have given Petitioner a passing grade.

6. Under the doctrine of fundamental fairness, is Petitioner entitled to a

passing grade on the July, 1982 Pennsylvania Bar Examination and admission to the Pennsylvania Bar.

PARTIES

All parties to the proceeding are contained in the caption of the case.

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JURISDICTIONAL STATEMENT

The questions presented in this petition arise from a judgment by the Supreme Court of Pennsylvania, Eastern District, denying an appeal in the matter of Joseph T. Smith from the decision of the Pennsylvania Board of Law Examiners, No. 42 E.D. Miscellaneous Docket, 1983. Application for admission to the Bar denied May 27, 1983. Petition for reconsideration denied August 15, 1983. On November 9, 1983, this Court granted Petitioner an order extending time to file petition for writ of certiorari, No. A-354, to and including January 12, 1984.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257 (3).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, Amendment XIV

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

1. Petitioner is a highly respected and well qualified professional, employed by the United States Department of Health and Human Services, National Institute of Mental Health, as a forensic psychiatrist. As well as possessing degrees in medicine and law, he is certified by the American Board of Psychiatry and Neurology, the American Board of Forensic Psychiatry, and the American Board of Law in Medicine. He is also a Fellow of the American Psychiatric Association, Fellow of the American Academy of Forensic Sciences, and Fellow of the American College of Legal Medicine (Appendix X).

2. Petitioner is a December 1980 graduate of the American University,

Washington College of Law. On the July 1982 bar examination, the Pennsylvania Board of Law Examiners reported a Multistate Bar Examination scaled score of 125, a converted essay score of 132.893, and a combined score of 128.95. A passing grade for the July 1982 bar examination was 129. Via letter dated December 14, 1983, Petitioner pointed out to Respondent that he had actually achieved a passing grade, but that Respondent had failed to recognize this because of its use of invalid numerical computations in arriving at Petitioner's final combined score. Petitioner's request for recognition of his passing grade was denied by Respondent.

3. In step one, on the 1982 bar examination grading summary sheet, (Appendix XI) Respondent, summed up the

correct answers in each MBE section for a total raw score of 116. In step two, the raw score of 116 was converted to a scaled score of 125. By interpolation it can be seen that step two is done in two parts, as follows: First, the raw MBE score of 116 was multiplied by a conversion factor (.8915) obtaining a product, 103.4140. Second, another conversion factor was added, (21.9924) for a total sum of 125.4064. This sum was rounded down to the final scaled score of 125.

4. In step three, the eight essay question scores were totalled for a sum of 450, then divided by eight to obtain an average of 56.25. This average was then rounded up to 56.3.

5. In step four, the rounded-up essay average of 56.3 was placed on the MBE

scale and converted to a six digit number (132.893). Respondent stated an intention to convert 56.3 to a three digit number both in the grading summary sheet and in the statement of the action of the Pennsylvania Board of Law Examiners to the Honorable Chief Justice and Associates Justices of the Supreme Court of Pennsylvania (Appendix I) but converted it to the six digit number 132.893.

6. In step five, the scaled MBE three digit figure of 125 was combined with the converted essay score six digit figure, 132.893 for a total of 257.893. Respondent then divided this number by two for a score of 128.946. Respondent then rounded this six digit number up to a five digit final score of 128.95.

7. Respondent states on the grading summary sheet, "This entire grading procedure is based on established statistical testing methods which are complicated and which include calculations by computer. The Board does not feel that an applicant is entitled to a detailed explanation of it's grading processes." Petitioner requested a detailed explanation of Respondent's grading processes in a letter dated January 8, 1983, in order to show the error in computation, but this was denied by Respondent in a letter dated February 8, 1983 (Appendix VII).

8. Petitioner filed his intention to seek judicial review in a letter dated January 6, 1983.

9. Respondent filed an untimely formal adjudication in a letter dated March 11, 1983.

10. Petitioner filed a timely petition for review on April 5, 1983.

11. The federal questions raised in this petition for certiorari were first raised in an appeal to the Supreme Court of Pennsylvania. Failure to grant due process and equal protection was demonstrated by proving mathematically that Respondent did not use valid numerical computations. The Supreme Court of Pennsylvania denied Petitioner's application for admission to the Bar (Appendix II), May 27, 1983.

12. On August 15, 1983, the Supreme Court of Pennsylvania denied petition for reconsideration. Mr. Justice Larsen and Mr. Justice Hutchinson dissenting (Appendix III).

13. On November 9, 1983, the Supreme Court of the United States extended the time for filing a petition for Writ of Certiorari (Appendix IV).

WHY CERTIORARI SHOULD BE GRANTED

ARGUMENT

POINT I

1. Petitioner was deprived of due process and equal protection under the Fourteenth Amendment. The practice of law is not a matter of the State's grace. Schware v. Board of Examiners, 353 U.S. 232 (1957). A person cannot be prevented from practicing law without valid reason. Nothing could be more invalid than Respondent's careless statistical computation that distorts the final grade to Petitioner's detriment on the July 1982 Pennsylvania Bar Examination. Respondent ignores the need to interpret statistics with caution; the Bar Examiner 1979 Vol 48 Nos 7-8 pp 137, 139; University of Pennsylvania Law Review

Vol. 118, 945, 982 Admission to the Pennsylvania Bar: The Need for Sweeping Change; 1979 Annual Report of the Adminstratiove Office of Pennsylvania courts p. 31, Chief Justice Michael Eagan.

Petitioner was also deprived of due process when Respondent denied access to the error in computational methods that caused him to fail in a letter dated February 8, 1983 (Appendix VII).

A. Respondent rounded Petitioner's MBE scaled score down to a three digit number, (125,) before combining it with a non-rounded converted essay score, (132.893). This resulted in a failing grade (128.95)for Petitioner that would have been a passing grade (129) using standard procedures.

B. According to standard computational procedure, Respondent has the choice of rounding both scaled scores to three digit numbers before combining, or of combining with both in a six digit form, but not as Respondent did by rounding the MBE scaled score, while not rounding the converted essay score before combining. If Respondent had followed either correct procedure, Petitioner would have achieved a combined score of 258, and an average (passing grade) of 129. Respondent recognized this mathematical logic, in stating it's intention on the summary grading sheet (Appendix XI) to convert the essay score to a three digit number, which, of course, it failed to do.

C. Respondent failed to round the converted essay score of 132.893 to three digits. This should have been done

according to Respondent's stated policy (Step 4, summary grading sheet, Appendix XI). This would have given a converted essay score of 133, which added to the MBE scaled score of 125 for a sum of 258 would average to a final grade of 129, (passing).

POINT II

1. Respondent showed invidious discrimination by passing certain applicants whose total combined score was less than Petitioner's total combined score, simply because of the failure to abide by standard numerical computations. The following is an example of this discrimination leading to an unfair result: Applicant A with an MBE non-rounded six digit scaled score of 125.510 and a converted essay score of 132.093 has a total combined score of 257.603. Applicant A has a failing grade

of 128.83 and is less than Petitioner if both the MBE and the converted essay scaled scores are kept at six digits. On the other hand, if Applicant A's MBE scaled score is rounded to 126 before combining (the approach taken by Respondent) he will obtain a combined total of 126 + 132.093 = 258.093, averaged to 129.046, a passing grade. Petitioner's MBE scaled score of 125.406, combined with his converted six digit essay score gives a higher combined score than Applicant A, 258.299 as compared to Applicant A's combined score of 257.603.

	Applicant A	Petitioner
MBE Score	125.510	125.406
Converted Essay score	132.093	132.893
Combined score	257.603	258.299
Averaging	$\frac{257.603}{2}$	$\frac{258.299}{2}$
Average score	=128.801 (failing grade)	=129.199 (passing grade)

Following the computational procedure used by Respondent, Applicant A's MBE scaled score of 125.510 would be rounded up to 126.0 while Petitioner's MBE scaled score of 125.406 would be rounded down to 125.0. Using these new figures, Applicant A would pass while Petitioner would fail. This is the mistake Respondent refused to correct.

	Applicant A	Petitioner
MBE Score	126	125
Converted Essay score	132.093	132.893
Combined score	258.093	257.893
Averaging	$\frac{258.093}{2}$	$\frac{257.893}{2}$
Aveage score =	129.05 (passing grade)	=128.95 (failing grade)

Hence, Applicant A, whose combined score is less, passes, while Petitioner whose combined score is higher, fails, and only because Respondent failed to keep both scores in a six digit form or to round the converted essay score as Respondent

faithfully intended to do. Passing Applicant A who actually failed while failing Petitioner who actually passed, is the height of manifest injustice and denial of equal protection. In Mathews v. Eldridge 96 S.Ct. 893 (1976), this court stated that due process before deprivation of property interests required consideration of: 1) private interest. 2) risk of erroneous deprivation of such interest, 3) government's interest. The private (property,) interest in this case is Petitioner's ability to practice law in Pennsylvania. Erroneous deprivation of this property interest has already deprived Petitioner of income he would have earned in such practice since July 1982. The government's interest is negligible because reversal of the Board's decision would entail no added fiscal or administrative costs. In

Application of Arthur H. Peterson for admission to the Alaska Bar Association, 459 P. 2nd 703 (1969) the court held that the applicant had been denied due process when the Board witheld information needed to draft an appeal. In the present case, Petitioner was able to detect an inherent defect in Respondent's methods, by implication, but was hindered in his attempts to prove his case by Respondent's refractory stance, refusing to authorize either the Educational Testing Service or the National Conference of Bar Examiners to provide Petitioner with the information needed to construct his case (Appendix VII).

POINT III

1. It was manifestly unjust for Petitioner to have to wait more than a year longer than the applicants who were

awarded a passing grade, in order to begin the practice of law. Because Respondent failed to follow established statistical methods Petitioner was forced to prove his passing grade before entering the practice of law, while those awarded a passing grade had to prove nothing.

POINT IV

1. Respondent was guilty of invidious discrimination in favor of all those who received passing grades by denying a passing grade to Petitioner and at the same time denying him access to the device by which he could demonstrate Respondent's error in computational methods. Petitioner, avers that using valid statistical methods such as those used by the Administrative Office of the Pennsylvania Courts (Appendix VII) or

governmental agencies such as the Department of Defense (Appendix VI), he passed the exam, and should not have to prove it any more than those who were awarded passing grades.

POINT V

1. When Respondent misrepresented it's computational method (Step 4, summary grading sheet, Appendix XI), Petitioner experienced duress, and felt coerced into making a choice between either repeating the bar examination; giving up the plan to practice law in Pennsylvania; or going to the trouble of making an appeal. There was duress, coercion, and misrepresentation.

POINT VI

1. Under the doctrine of fundamental fairness, Petitioner is entitled to a reversal of Respondent's determination to fail him on the July 1982 bar exam, and should be admitted to

the Pennsylvania Bar without further delay. Step four on the summary grading sheet, (Appendix XI) states specifically that Respondent will convert the essay scaled score to a three digit number, but Respondent used a six digit number instead. It is fundamentally unfair for Respondent to establish a valid and adequate standard for itself to follow and then adhere to a far lower standard of statistical accuracy.

In it's statement of action, pgs. A3, A4, (Appendix I) Respondent is logically and mathematically inconsistent. The statement "after an examinee's essay average is determined, that percentage is converted to a three digit figure" is not consistent with the later statement in the same paragraph "...it is not the Board's grading procedure to round off the converted essay score." A converted essay score of

132.893 is a six digit number and the only way it can be made a three digit number is by rounding off. The Board kept 132.893 for computing Petitioner's final grade. This inconsistency indicates that the Board is arbitrary, capricious, unaware, or unconcerned about accuracy.

CONCLUSION

Petitioner asks the Court to recognize that Respondent was arbitrary and capricious when it abandoned established statistical testing methods in computing Petitioner's final grade on the July 1982 bar examination, resulting in a determination not to admit him to the Pennsylvania Bar. This was a denial of due process and equal protection. Obtaining accuracy even when staying with established statistical approaches is not easy (Appendix V). Therefore, Respondent should be held to a high standard of following very closely, established statistical procedures when computing pass/fail grades for applicants to the Bar. Respondent should certainly be held to his own highest standard (Step 4 summary grading sheet) converting essay

score to a three digit figure before combining with MBE score. Statistical experts are emphatic regarding the distortion and inaccuracy that result when a six digit MBE scaled score is rounded to a three digit number (125) before combining it with a six digit converted essay score (132.893). Petitioner points out the manifest injustice when deprived of a rightful passing grade due to careless, arbitrary, and capricious numerical computations. Respondent had the opportunity to rectify this situation when Petitioner brought to its attention the error that results from adding apples with oranges. In the same fact situation on the July 1982 bar examination in Massachusetts (Appendix IX), the Board immediately recognized the error of combining a rounded three digit MBE score with a non-rounded six digit converted essay score and awarded a

passing grade to two applicants. Respondent deprived Petitioner of due process of law under the Fourteenth Amendment by refusing to provide the detailed explanation of its computation procedures. Invidious discrimination characterized Respondent's approach whereby applicants could obtain a lower combined score than Petitioner and still pass the exam. Petitioner is entitled to immediate acceptance to the Pennsylvania Bar, and remittance of costs of appeal.

APPENDIX

TO PETITION FOR CERTIORARI

TO THE SUPREME COURT

OF PENNSYLVANIA

APPENDIX I

STATEMENT OF THE ACTION OF THE PENNSYLVANIA BOARD OF LAW EXAMINERS

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA

In the Matter of the Appeal of Joseph T. Smith.
From the Decision of the Pennsylvania Board of Law Examiners
No. 42 ED Miscellaneous Docket, 1983

On May 17, 1982, Joseph T. Smith filed an application with the Pennsylvania Board of Law Examiners ("Board"), under Pa. B.A.R. 203, for permission to sit for the July, 1982 bar examination. On October 15, 1982, the Board notified Dr. Smith that he had failed the July, 1982 bar

examination. By letter, dated December 14, 1982, Dr. Smith requested that his failing grade be converted to a passing score. On December 21, 1982 the Board denied Dr. Smith's request.

Joseph T. Smith is a December, 1980 graduate of the American University, Washington College of Law. On the July, 1982 bar examination he achieved a Multistate bar examination scaled score of 125, an essay average of 56.3%, and a combined score of 128.95. On October 22, 1982, Dr. Smith requested to have his multistate examination hand-scored. This was completed by the Educational Testing Service and on November 17, 1982, the Board notified Dr. Smith that his score was correct. Dr. Smith did not request that his essay papers be re-graded.

An examinee may pass the Pennsylvania bar examination in one of two ways. An examinee who achieves a Multistate bar examination scaled score of 135, automatically passes, and his or her essay papers are not read. If an examinee does not achieve such a score (approximately 70% pass on MBE alone in July), his or her essay papers are graded, and if he or she obtains a combined score (the average of th MBE scaled score and essay scores) of 129.00, the examinee passes.

After an examinee's essay average is determined, that percentage is converted to a three-digit figure. Dr. Smith's essay average of 56.3% was converted to 132.893 which when averaged with his scaled M.B.E. score of 125 gave him a combined score of 128.95. Dr. Smith argues that if his converted essay score

of 132.893 was rounded off to 133, he would have achieved a passing score. Although this may be the case, it is not the Board's grading procedure to round off the converted essay score.

Dr. Smith failed the July, 1982 bar examination by .05 of a point. Although this seems "very close to passing" to him, ten (10) other examinees achieved scores between 128.47 and 128.99 on the same examination.

For the reasons set forth above, the Board respectfully requests and recommends that this appeal be denied.

Respectfully submitted,

Susan L. Anderson, Secretary

APPENDIX II

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

MAY 31, 1984

RE: In the Matter of the appeal of Joseph T. Smith from the Decision of the Pennsylvania Board of Law Examiners

Petitioner: Joseph T. Smith

No. 42 E.D. Misc. Docket 1983

Dear Mr. Smith:

This is to advise you that the following Order has been endorsed on the Petition for Review, filed in the above-captioned matter:

May 27, 1983

Application for Admission to Bar Denied.

BY THE COURT: SAMUEL J. ROBERTS, C.J.

Very truly yours,

Marlene F. Lackman, Esq. Prothonotary

Patrick Tassos, Deputy Prothonotary

APPENDIX III

IN THE SUPREME COURT OF PENNSYLVANIA

In the Matter of	)	No. 42 E.D. Misc.
Appeal of JOSEPH	)	Dkt. 1983
T. SMITH from the	)	Petition for
Decision of the	)	Reconsideration of
Pennsylvania Board	)	this Court's Order
of Law Examiners	)	of May 27, 1983

ORDER

AND NOW, this 15th day of August, 1983, the Petition for Reconsideration is denied.

BY THE COURT:

Samuel J. Roberts

Chief Justice

Mr. Justice Larsen and Mr. Justice Hutchinson dissent.

APPENDIX IV

SUPREME COURT OF THE UNITED STATES

NO. A-354

JOSEPH T. SMITH,

Petitioner,

v.

PENNSYLVANIA BOARD OF LAW EXAMINERS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of Petitioner, IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 12, 1984.

/s/ William J. Brennan

Associate Justice of the Supreme Court of the United States

Dated this 9th day of November, 1983.

APPENDIX V

Page 1

SUPREME COURT OF PENNSYLVANIA

1979 ANNUAL REPORT

FOREWORD

It is my pleasure as Chief Justice to present to the citizens of Pennsylvania the Annual Report of the Adminstrative Office of Pennsylvania Courts. I would like to thank Judge Alexander F. Barbieri, Court Administrator of Pennsylvania, and his talented staff for their hard work in the preparation of this report...

APPENDIX V

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SUPREME COURT OF PENNSYLVANIA

1979 ANNUAL REPORT

PART IV

COURTS OF COMMON PLEAS

JUDICIAL CASE VOLUME

COMMENT ON STATISTICS

"He uses statistics as a drunken man uses lamposts--for support rather than for illumination." Andrew Lang.

Statistics, as a branch of mathematics, is a sophisticated way of organizing large amounts of data into an uncomprehensible mess... waving a magic wand... and producing very impressive tables and charts which are easily read and understood by the public. Or, so we hope... and the very impressive tables and charts in this section are product of the combination of the mess and the wand...

APPENDIX VI

AMERICAN SOCIETY OF TESTING AND MATERIALS

Designation: E 29-67 (Reapproved 1980)

Standard Recommended Practice for

INDICATING WHICH PLACES OF FIGURES ARE TO BE CONSIDERED SIGNIFICANT IN SPECIFIED LIMITING VALUES. (1)

This standard is issued under the fixed designation E29, the number immediately following the designation indicates the year of original adoption or in the case or revision, the year of last revision. A number in parentheses indicates the year of last reapproval.

This recommended practice has been approved for use by agencies of the Department of Defense and for listing in the DoD Index of Specifications and Standards.

1. Scope: 1.1 This recommended practice is intended to assist the various technical committees in the use of uniform methods of indicating the number of places of figures which are to be considered significant in specified limiting values, for example, specified maximum values and specified minimum values. Its aim is to outline methods which should aid in clarifying the intended meaning of specified limiting values with which observed values or calculated values obtained from tests are compared in determination conformance with specifications.

3.4 Rounding-off Procedure--The actual rounding-off procedure shall be as follows:

3.4.1 When the figure next beyond the last place to be retained is less than 5, retain unchanged the figure in the last place retained.

3.4.2 When the figure next beyond the last place to be retained is greater than 5, increase by 1 the figure in the last place retained.

3.4.3 When the figure next beyond the last place to be retained is 5, and there are no figures beyond this 5, or only zeros, increase by 1 the figure in the last place retained if it is odd, leave the figure unchanged if it is even. Increase by 1 the figure in the last place retained, if there are figures beyond this 5.

3.4.4 This rounding-off procedure may be restated simply as follows: When rounding off a number to one having a specified number of significant places, choose that which is nearest. If two choices are possible, as when the digits dropped are exactly a 5 or a 5 followed only by zeros, choose the one ending in an even digit...

(1) This recommended practice is under the jurisdiction of ASTM Committee E-11 on Statistical methods.

Current edition effective No. 1, 1967. Originally issued 1940. Replaces E29-60T.

APPENDIX VII

PENNSYLVANIA BOARD OF LAW EXAMINERS
674 PUBLIC LEDGER BUILDING
INDEPENDENCE SQUARE
PHILADELPHIA, PA. 19106

February 8, 1983

Dr. Joseph Smith, M.D.
9500 Eldwick Way
Potomac, MD 20854

Dear Dr. Smith:

At its meeting on Friday, January 28, 1983 the Pennsylvania Board of Law Examiners reviewed your letter of January 18, 1983 requesting a detailed explanation of our statistical testing methods. Unfortunately, I must inform you that the Board has denied your

request. Not only will the Board not produce the information for you, but they will not authorize its release from either Educational Testing Service or the National Conference of Bar Examiners.

Pa. B.A.R. 222 provides that an applicant may have a final determination of the Board of Law Examiners reviewed by the Supreme Court of Pennsylvania. To seek judicial review of this decision, you must file with, the Pennsylvania Board of Law Examiners, written notification of your intention to appeal within thirty (30) days of receiving this letter.

Very truly yours,

Susan L. Anderson, Secretary

APPENDIX VIII

ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS
1414 THREE PENN CENTER PLAZA
PHILADELPHIA, PENNSYLVANIA 19102
(215) 496-4500

Dear Mr. Smith:

I am writing in response to your request for information regarding the manner of computing statistics and ratios used by this office in compiling caseload figures. The Administrative Office has not established formal standards for rounding numbers, either to the nearest whole number or to a less significant digit. However, following standard computational procedures, we "round-up" when the decimal is equal to or greater than one-half of the next higher digit. For example, 91.5 would be rounded-up to

92, and 115.38 would be rounded-up to 115.4. If the decimal is less than one-half of the next higher digit, the number is "rounded-down."

Please note that the number of digits employed to the right of the decimal point depends upon the nature of the analysis. In some instances, only whole numbers are used, while in other cases, one or two significant digits are used.

I hope you find this information of value.

Very truly yours,

Abraham J. Gafni
Court Administrator of Pennsylvania

APPENDIX IX

THE COMMONWEALTH OF MASSACHUSETTS

BOARD OF BAR EXAMINERS

77 FRANKLIN STREET, BOSTON 02110-1593

November 19, 1982

William F. Swiggart

33 Concord Ave., #12

Cambridge, Massachusetts 02138

Dear Mr. Swiggart:

As I told you on the telephone, I have recalculated your law examination mark and you have passed the examination.

The Educational Testing Service corrected your raw multistate score to a scaled score and reported the scaled score rounded off to the nearest whole digit. Your rounded off score was

combined with a scaled score on the essay which was not rounded off. The total reflected the combination of the rounded off figure and a figure not rounded off.

I secured from the Educational Testing Service the formula used to convert the raw MBE mark to the scaled MBE mark. When I used that formula on your raw MBE mark, I secured a scaled score without rounding off. The combination then put you over 270.

Thank you for calling the problem to my attention. Your letter allowed me to help you and one other applicant.

Congratulations,
Fredric S. O'Brien, Chairman

APPENDIX X

CURRICULUM VITAE

March 1983

JOSEPH THURSTON SMITH, MD, JD, FAPA, FCLM, FAAFS
11505 LeHavre Dr.
Potomac, MD 20854

DIPLOMATE, American Board of Law in Medicine
DIPLOMATE, American Board of Psychiatry and Neurology
DIPLOMATE, American Board of Forensic Psyciatry
MEDICAL OFFICER (Psychiatry) US Department of Health and Human Services, National Institute of Mental Health in the Division of Forensic Programs, St. Elizabeth's Hospital, Washington, D.C.

A. EDUCATION

1.	University of Alberta Alberta, Canada 1946-1952	BSc and MD
2.	George Washington University Washington, D.C. 1975-1976	Basic Law
3.	George Washington University Washington, D.C. 1975-1976	Forensic Sciences
4.	Georgetown University Law Center Washington, D.C. 1978	Street Law

5. The Catholic University of American Washington, D.C. 1979 — Forensic Medicine

6. The American University Washington College of Law 1976-1980 — Juris Doctor

B. MILITARY SERVICE

RCAF World War II: Flight Lieutenant (Navigator, Air Gunner and Bombardier) four years. Instructor, Officers' Training School.

Post-war Instructor in Arctic survival techniques for Air Force pilots.

APPENDIX XI

JULY 1982 BAR EXAMINATION

GRADING SUMMARY SHEET

EXAMINATION NO. 1099

MBE

Constitutional Law	30 questions	14
Contracts	40 questions	24
Criminal Law	30 questions	17
Evidence	30 questions	16
Real Property	30 questions	16
Torts	40 questions	29

Raw Score	116
Scaled Score	125

Essay

Question #1	Decedents' Estate	60
Question #2	Corporations	40
Question #3	Torts	70
Question #4	Criminal Law	70
Question #5	Evidence	80
Question #6	Real Property	50
Question #7	Contracts	25
Question #8	Constitutional Law	55

Essay Score 56.3

Converted Essay Score 132.893

Combined Score 128.95 (5)

The combined passing score is 129.00

(1) The number of correct answers in each MBE section is determined.

(2) The raw score is converted to a scaled score.

(3) Each essay question is graded and the eight scores are averaged.

(4) The essay average is placed on the MBE scale, converting it to a three digit number.

(5) The scaled MBE and the Converted Essay Score are averaged.

This entire grading procedure is based on established statistical testing methods which are complicated and which include calculations by computer. The Board does not feel that an applicant is entitled to a detailed explanation of its grading process.

Office - Supreme Court, U.S.
FILED
FEB 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1188

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH T. SMITH,

Petitioner

v.

PENNSYLVANIA BOARD OF LAW EXAMINERS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF
PENNSYLVANIA

BRIEF OF RESPONDENT, PENNSYLVANIA BOARD OF LAW EXAMINERS

Charles W. Johns, Esquire
Alan C. Milstein, Esquire
Legal Counsel to the Administrator
of Pennsylvania Courts
Attorneys for Respondent,
Pennsylvania Board of Law Examiners

Administrative Office
of Pennsylvania Courts
1414 Three Penn Center Plaza
Philadelphia, PA 19102
(215) 496-4529

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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No. 83-1188

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH T. SMITH,

Petitioner

v.

PENNSYLVANIA BOARD OF LAW EXAMINERS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT, PENNSYLVANIA BOARD OF LAW EXAMINERS

COUNTER-STATEMENT OF MATERIAL FACTS

The Petitioner received a failing score on the July 1982 Pennsylvania Bar Examination. Petitioner achieved a Multistate Bar Examination ("MBE") scaled and rounded-off score of 125 and a converted essay score of 132.893 for a combined score of 128.95. Claiming that the method of producing these scores wrongly deprived him of a passing grade, Petitioner sought review by the Pennsylvania Supreme Court. On May 27, 1983, Petitioner's Application for Admission to the Bar was denied in an Order signed by the Honorable Samuel J. Roberts,

then Chief Justice of the Supreme Court of Pennsylvania. Petitioner then filed a Petition for Reconsideration, which was denied by the Pennsylvania Supreme Court on August 15, 1983. Petitioner now seeks review by this Honorable Court.

Essentially, Petitioner's claim is that the method by which applicants' scores are computed by the Pennsylvania Board of Law Examiners ("Board") is violative of his rights to due process and to equal protection of the law. The gravamen of Petitioner's complaint is that either his essay score should have been rounded off to a three-digit whole number before averaging it with the MBE score or the MBE score should not have been rounded off before averaging it with the essay score. In either case, Petitioner asserts, he would have received a passing grade.

An examinee may pass the Pennsylvania Bar Examination in one of two ways: Any examinee who achieves an MBE-scaled score of 135 or higher automatically passes and his or her essay papers are not read. If an applicant does not achieve a 135 score, his or her essay papers are graded and if he or she obtains a combined score of 129, the examinee passes.

The scores are computed in the following manner: The MBE score is scaled and converted to a three-digit whole number by the National Conference of Bar Examiners through the Education Testing Service ("ETS"). To arrive at this figure, ETS first adds up the number of correct answers in each MBE section and then converts this raw score to a scaled score. The scaled score is the raw score adjusted upward to compensate for the degree of difficulty of the particular examination and to standardize the scoring. ETS then rounds the scaled score off so that the MBE scores received by the Board are all three-digit whole numbers.

The Pennsylvania Board of Law Examiners determines the essay score by averaging the two-digit per-

centage scores achieved on each of eight essay questions. This figure is then rounded off to the tenth decimal place and placed on a multistate scale to achieve a three-digit whole number carried to the thousandth decimal place.

This number is then averaged with the three-digit MBE score to produce a combined score expressed as a three-digit whole number rounded off to the hundredth decimal place.

ARGUMENT

I. Petitioner Has Suffered No Violation of Due Process or Equal Protection by the Board's Method of Calculating Examination Scores

It has long been stated that the admission to practice law in a state and before its courts is primarily a matter of state concern. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). Accordingly, a federal court cannot interfere with a state's determination absent a showing that an applicant has been denied admission for constitutionally impermissible reasons. *Id.* at 238-40, 77 S.Ct. at 752. States can require high standards of qualification before admitting an applicant to the Bar so long as each qualification has a rational connection with the applicant's fitness to practice law. *Id.; cf. Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

In the case *sub judice*, Petitioner challenges not the Bar Examination itself, but the method by which examination scores are computed. First, Petitioner claims that he suffered a consitutional deprivation because the MBE scores were rounded off to a three-digit whole number. Petitioner has offered no support for his claim that he was entitled not to have the MBE score rounded off; nor could he find such support. It is of no constitutional dimension whether Petitioner is correct or not in stating that the rounding off of this score is not the most accurate means of determining who is most qualified to practice law. The question is not whether one grading procedure is the most effective way of evaluating an applicant's fitness, but whether it is not so arbitrary as to constitute a violation of due process. *Thompson v. Schmidt*, 601 F.2d 305 (7th Cir. 1979).

The grading procedure about which Petitioner complains is clearly not so arbitrary. Petitioner states that it is Respondent who rounds off the MBE score; this is simply not the case. The MBE score is scaled and

rounded off by ETS, which sends Respondent printouts of the applicants' raw and scaled scores all in three-digit whole numbers. Furthermore, that the Board plays no role in the MBE's preparation, grading, or calculation of a final score is neither arbitrary nor unconstitutional. *Cf. Pettit v. Gingerich*, 427 F.Supp. 282 (D. Md. 1977).

Petitioner also claims that the Board should have rounded off the essay score before averaging it with the MBE score. Again, Petitioner has not offered nor could he find any support for his claim that the Board should have rounded off the essay score. Furthermore, as stated above, even if the grading procedure chosen by the Board is not the best one from Petitioner's point of view, no deprivation of constitutional dimension has occurred absent a showing that the procedure is so arbitrary as to deprive the applicant of due process. *Thompson, supra.*

In addition, Petitioner claims that the calculation methods of the Board "invidiously discriminate" against him. Petitioner does not maintain that the Board adopted a particular method of calculating scores so that he personally would fail the examination, but only that the chosen method results in applicants with his scores failing while others pass. As Petitioner concedes, however, if the Board had calculated scores as he desires, some of those who had passed the examination would have failed while he would have passed. Indeed, any failing applicant could devise a scoring scheme which would permit him or her to pass.

For the Board's scheme to pass constitutional muster, all that is required is that it not be arbitrary. Certainly, it is at least as rational for the Board not to round off the essay scores — that is, to draw a precise line and not to waver from it — as it would be to push some applicants' scores up and some down.

Petitioner also claims that the Board's stated policy was "to convert the essay average to a three digit number" before averaging it with the MBE score (see Appen-

dix III to Petitioner's Petition), and that the Board's failure to abide by this policy violated his constitutional rights. It is difficult to understand how Petitioner was, as he claims, coerced and placed in duress by the issuance of that statement. Certainly, Petitioner cannot maintain that he purposely achieved his particular score in reliance on this statement. In any event, the statement quoted by Petitioner does not set forth the Board's grading procedures, but was designed to express in general terms how an examinee's score was determined. The statement has since been changed to read, "The essay average is placed on the MBE scale, converting it to a three digit whole number carried to the thousandth decimal place."

Moreover, even if the statement did inartfully or ambiguously describe the Board's policy of converting a percentage score to a score compatible for averaging with the three-digit MBE score, no constitutional violation has occurred. The law is clear that mistakes by the state or its officers — as opposed to intentional deprivations — do not rise to the level of constitutional violations. *Crocker v. Hakes*, 616 F.2d 237 (5th Cir. 1980); *Marchant v. City of Little Rock*, 557 F.Supp. 475 (E.D. Ark. 1983).

Finally, Petitioner claims he was denied due process by the Board's refusal to provide him with a detailed explanation of the statistical testing methods. The only case relied on by Petitioner to support this claim is inapposite to the instant case. While the court in *In Re Peterson*, 459 P.2d 703 (Alas. 1969), did hold that applicants were entitled to certain documents when appealing their failing scores, the court relied on its inherent power to control admission to the state Bar and not on any federal constitutional grounds. For a similar reading of *Peterson*, *see Witheld v. Ill. Bd. of Law Examiners*, 504 F.2d 478 (7th Cir. 1974); *Singleton v. Louisiana State Bar Association*, 413 F.Supp. 1092 (E.D. La.

1976). Further, the court in *Peterson* refused to admit the applicant in that case to the Bar as a result of what it considered unacceptable procedures; instead, the court remanded the case with an order that the applicant be given the requested documents. In the instant case, even if Petitioner were entitled to the documents he requests, it is difficult to see how he was harmed by the Board's refusal to provide them. He appears to have otherwise obtained all the information he requested and its receipt has in no way furnished him with a case of constitutional dimension or a right to be admitted to the Pennsylvania Bar.

CONCLUSION

There being no special and important reasons which imply a reach to a problem beyond the academic or the episodic, and there being no case involving principles the settlement of which is of importance to the public as distinguished from the parties, the Board of Law Examiners respectfully submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Charles W. Johns, Esquire
Alan C. Milstein, Esquire
Legal Counsel to the Administrator of Pennsylvania Courts
Attorneys for Respondent, Pennsylvania Board of Law Examiners

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